STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MARY MASSEY, Deceased.

UNPUBLISHED

JAMES E. MCCARTHY, Personal Representative of the Estate of MARY MASSEY, Deceased,

Appellee,

and

DAVID MASSEY,

Petitioner-Appellee,

v

No. 200405
Wayne Probate Court
LC No. 94-538106-SE

CANDICE MASSEY,

Respondent-Appellant.

Before: Jansen, P.J., and Kelly and Markey, JJ.

MARKEY, J. (dissenting)

I respectfully dissent. I find that the parties agreed to a final settlement and placed it on the record in open court. Thus, the trial court's factual determinations are not clearly erroneous. MCR 2.613(C); MCR 2.507(H).

I agree with the majority that the propriety of the probate court's ruling that respondent abide by the terms of the proposed settlement depends on respondent's having in fact agreed to the settlement in open court. I believe, however, that the probate court did not clearly err in finding that the statements respondent's counsel made in open court constituted acceptance of a settlement.

Petitioner's counsel's statement that he and opposing counsel had "reached agreement, we believe," although he anticipated the possibility of further discovery and mediation, indicated that the

amount of the settlement, i.e., $35,000, was not in dispute; rather, only the mode of payment was undecided.

Apparently, on December 10, 1996, petitioner tendered to respondent a check in the amount of $35,000. This is consistent with the proposed order generated from the November hearing that required payment of the $35,000 within two weeks. When respondent failed to accept the check, petitioner moved for entry of the proposed order, i.e., to enforce the settlement. At the December 16 hearing, petitioner argued that the parties had entered into a binding settlement and respondent was failing to honor it. Respondent in turn agreed that the parties had "placed on the record the general outline of the settlement, the details of the way in which the case would be eventually be dismissed. . . ." Counsel then explained that because respondent had not agreed to the terms of the settlement, he had not signed the order or accepted the check.

Merely because counsel for both parties planned for or discussed further proceedings at the time the settlement terms were placed on the record this case is insufficient reason to conclude that the agreement placed on the record did not constitute a final resolution of the issues addressed in the settlement. Indeed, the fact that the settlement left minor issues open for further resolution did not invalidate the settlement agreement regarding two primary issues: the amount of money to be paid and the distribution of the fabric. At the original hearing, the parties were simply discussing the mode of payment. Petitioner offered timely payment in full via check. The fact that petitioner felt she was entitled to another $500 does not invalidate the settlement made on her behalf by her attorney.

This case is unlike *Brunet v Decorative Engineering, Inc*, 215 Mich App 430, 432; 546 NW2d 641 (1996), where the parties reached a settlement agreement at a deposition. When the defendant disavowed the agreement as being the result of coercion, and the plaintiff attempted to enforce the agreement, the trial court entered a consent judgment under the terms of the agreement. *Id.* at 432-433 This Court reversed the trial court because the defendant repudiated the agreement before it was placed on the record in court or reduced to writing. *Id.* at 436. Here, the agreement was placed on the record in open court, and defendant only attempted to repudiate it after the fact. Cf. *id.* at 433-436. Notably, respondent cites to no cases supporting the assertion that the agreement set forth on the record in open court was too vague to be enforced. Thus, I find that the probate court did not clearly err in holding that the parties, through their counsel, had agreed to a settlement in open court.[1]

Also, because respondent failed to raise the question whether the settlement was void for want of a writing as dictated by MCL 700.191(1); MSA 27.5191, I believe this issue is not preserved for appeal and find no manifest injustice absent appellate review See *Burgess v Clark*, 215 Mich App 542, 548; 547 NW2d 59(1996).

/s/ Jane E. Markey

[1] Various letters between counsel evidence that Candice Massey had indeed authorized her counsel to negotiate a settlement. MCR 2.507 clearly allows for counsel to negotiate settlements of a client.